United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7175

To be argued by
Elihu Inselbuch

United States Court of Appeals

For the Second Circuit.

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Brief for Defendant-Appellee, International Telephone and Telegraph Corporation.

UNITED STATES COURT OF APPEALS
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United States Court of Appeals

FOR THE SECOND CIRCUIT.

Docket No. 77-7175

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. MCKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, Inc., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATI

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Brief for Defendant-Appellee, International Telephone and Telegraph Corporation.

Defendant-appellee International Telephone and Telegraph Corporation ("ITT") submits this brief to urge affirmance of the order of the District Court which dismissed the complaint as time barred. ITT continues to adopt the legal arguments urged by the Avis defendants on the issue of the statute of limitations. ITT files this separate brief only to argue that the dismissal must be affirmed as to ITT for the further reason that the complaint fails to allege any wrongful conduct or agreement to take part in wrongful conduct on the part of any agent or employee acting on behalf of ITT.

I.

The Court may affirm the decision below for reasons different from those of the District Court.

In the District Court ITT joined in the reasoning of the Avis defendants that the complaint was barred by the applicable statutes of limitations and does so here. In addition, ITT asserted below that the complaint did not allege a cause of action against ITT and no reasonable inference would supply a cause of action. The District Court did not reach this question. ITT urges this as an additional reason for affirmance as to it. This Court is free to affirm on legal grounds other than considered by the court below. *Picture Music, Inc., v. Bourne, Inc.*, 457 F. 2d 1213, 1215 (2d Cir.), cert. den. 409 U. S. 997, 93 S. Ct. 320 (1972); *Barrett v. Baylor*, 457 F. 2d 119, 122 (7th Cir. 1972).

II.

The complaint fails to state a claim against ITT.

The only paragraphs in the complaint which at all refer specifically to ITT allege either its ownership of Avis stock or its contributions to the Institution for the Advancement of Criminal Justice (complaint, paras. 4[a], 6[g], 37[b]; App. 3a-4a, 6a, 12a). Nowhere is it even averred upon information and belief that ITT created, managed or even contributed to this foundation for any improper purpose or with any knowledge of the purposes for which the plaintiffs allege that it was run. Only reasonable inferences may be deduced from pleadings and ITT submits that the inferences plaintiffs wish to draw from ITT's contributions (inferences not alleged in their pleadings) are not deducible from the pleadings at all.

If plaintiffs and their counsel had any basis for a belief that ITT had engaged in the wrongdoing alleged in the complaint surely they would have had no difficulty in drafting the allegation and *signing* the pleading. (*See* Rule 11 of the Federal Rules of Civil Procedure.)

A motion to dismiss under Rule 12(b)(6) is a proper method for testing the legal sufficiency of the *complaint* itself, *Bing v. General Motors Acceptance Corporation,* 237 F. Supp. 911, 912 (E. D. So. Carolina 1965); 2A *Moore's Federal Practice,* ¶12.08 at 2266 (2d ed. 1975), and unwarranted deductions of fact or inferences which are not supported by allegations of specific facts cannot salvage a defective pleading, see *Ryan v. Scoggin,* 245 F. 2d 54, 57 (10th Cir. 1957); *Sinchak v. Parente,* 262 F. Supp. 79, 81 (W. D. Pa. 1966); *Huntley v. Gunn Furniture,* 79 F. Supp. 110, 111 (W. D. Mich. 1948); *Allied Steel & Tractor Products, Inc. v. First National City Bank of New York,* 54 F.R.D. 256, 260 (N. D. Ohio 1971). Obviously, plaintiffs here have done nothing more than name ITT as a defendant because of its stock ownership in Avis and its contributions to a not-for-profit corporation. This is insufficient as a matter of law, see *Allied Steel, supra.*

Plainly sensing the very real defects in their pleading, but not seeking leave to replead, plaintiffs opposed ITT's motion to dismiss by submitting affidavits asserting conclusions and/or hearsay statements (not alleged in the complaint) which purport to connect ITT to a conspiracy to injure them.

Apparently, plaintiffs were requesting the Court below to exercise its discretion, under Rule 12(b)(6) to permit

the introduction of materials extraneous to the complaint* and to convert ITT's motion to one for summary judgment under Rule 56. ITT asserted below that it had no objection to such treatment by the Court.

Rule 12(b) provides in pertinent part:

> "* * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 56(e) provides:

> "Form of Affidavits; Further Testimony; Defense Required. Supporting opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set

*See affidavit of Cestaro (paras. 3[b], 3[h], 4 and the copy of the McKenna affidavit annexed thereto at its paragraph 2; App. 27a-28a, 30a), and the affidavit of Marchetti (para. 2; App. 32a). The references to ITT in plaintiffs' brief (pp. 5, 17, 43-44) merely repeat conclusory and/or hearsay statements, and in any event, form no part of the requisite proof to avoid the operation of Rule 56(e) discussed *infra*.

> forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Nowhere in plaintiffs' affidavits is there even the claim to any firsthand knowledge of any activities undertaken by ITT. Plaintiff Cestaro annexed a copy of an affidavit by one Jeremiah McKenna dated May 29, 1974, which, albeit alleged on firsthand knowledge, nowhere claims that ITT made contributions to the Institute with knowledge of any unlawful purposes or with the intention of taking part in any unlawful activity. Stripped of their rhetoric, plaintiffs' papers offer *no* specific "facts as would be admissible in evidence" to support the inferences which they carefully have chosen not to plead but wish the Court to draw.

Summary judgment must be granted unless the Court finds that a genuine issue of fact exists. But no genuine issue of fact can be raised where affidavits are not based upon personal knowledge and do not supply admissible evidence, see, e. g., *Antonio v. Barnes,* 464 F. 2d 584, 585 (4th Cir. 1972); *Jefferson Construction Company v. United States,* 283 F. 2d 265, 267 (1st Cir. 1960); cert. den. 365 U. S. 835, 81 S. Ct. 748 (1961); *Feldman v. Birger,* 205 F. Supp. 87, 90 (D. Mass. 1962). Hearsay conclusions or allegations alone appearing in the papers have always been held insufficient, *Applegate v. Top Associates, Inc.,* 425 F. 2d 92, 96-97 (2d Cir. 1970); *Rossi v. Trans World Airlines, Inc.,* 507 F. 2d 404, 406 (9th Cir. 1974); *Jameson v. Jameson,* 176 F. 2d 58, 60 (D. C. Cir. 1949). Plaintiffs have had two full opportunities to state *their* case against ITT—their original complaint and in their opposition papers below. They have failed to do so within the meaning of Rules 12(b)(6) and 56(e) and for these reasons, the complaint must be dismissed against ITT.

CONCLUSION.

For the reasons advanced by the Avis defendants and for the reasons separately set forth by ITT, the judgment of the District Court should be affirmed.

Respectfully submitted,

GILBERT, SEGALL AND YOUNG,
Attorneys for Defendant-Appellee,
International Telephone and Telegraph
Corporation.

Of Counsel:

ELIHU INSELBUCH,
LOWELL A. MARGOLIN.

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

326—Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

G. THOMAS CESTARO, et al,
Plaintiffs-Appellants,

against

THOMAS J. MACKELL, et al,
Defendants-Appellees.

State of New York, County of New York, ss.:

Kenneth P. Riccardi, being duly sworn deposes and says that he is agent for Gilbert, Segall & Young, Esqs. the attorney for the above named Brief for Defendant-Appellee IT&T herein. That he is over 21 years of age, is not a party to the action and resides at 2821 W. 12th St. Bklyn, NY 11224

That on the 23 day of June, 1977 he served the within

Brief for Defendant-Appellee, IT&T

upon the attorneys for the parties and at the addresses as specified below

Spiros A. Tsimbinos

Attorney for Defendant-Appellee, Monty

Kew Gardens, N.Y. 11415

by depositing Two (2) Briefs
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 23
day of June, 1977

Roland W. Johnson

Kenneth P. Riccardi

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1979

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hereby admitted this day
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Attorney for

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Attorneys for
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